No. 89-556

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

1. Whether, as a matter of law, statistics alone showing a current *de facto* predominance of one race at public colleges and universities, which twenty-five years ago were segregated by state law, are sufficient to establish that a state is presently using Federal funds to continue racial discrimination in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution, where

> (a) for more than twenty-four years, any high school graduate of any race could, under the open admissions policy of the state's public colleges and universities, freely choose to be admitted to and attend any public college or university of choice within the state; and
>
> (b) the state, its public colleges and universities, and its higher education governing boards have engaged, for at least six years, in extensive affirmative action including recruitment of other-race students and faculty at previously one-race colleges and universities, an other-race faculty development program at previously one-race colleges and universities, enhancement of programs and facilities at historically black colleges and universities, and the expenditure of vast sums of money for historically black colleges and universities over-and-above a non-discriminatory state "formula" for funding all public colleges and universities in the state.

2. Whether racial balance is required of institutions of higher education under the Civil Rights Act of 1964 where such institutions have had open admission policies for 24 years and where students are exercising their constitutional right of free choice in selecting the college or university best suited to their educational needs.

3. Whether the district court exceeded the limits of its remedial authority and the constraints of federalism

by ordering overbroad and unsupported remedies, by radically restructuring higher education in Louisiana, including abolition of the State's four-board governance structure mandated by the Louisiana Constitution of 1974, by substituting therefor a court-created single board, and by ordering the implementation of a court-created plan for the structure of higher education in Louisiana contrary to the State's Constitution and laws.

4. Whether the district court exceeded its equitable remedial authority and violated due process when it *sua sponte* ordered the merger of Southern University Law Center into Louisiana State University Law Center, without an evidentiary hearing and contrary to the recommendations of all parties and the court-appointed special master.*

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* Actual parties to this proceeding in the United States District Court were

(1) The United States of America, appellee herein,

(2) The State of Louisiana, appellant herein,

(3) The State's Board of Regents,

(4) The Board of Supervisors for Southern University and Agricultural and Mechanical College, an appellant in a companion appeal to this Court,

(5) The Board of Supervisors for Louisiana State University and Agricultural and Mechanical College,

(6) The Board of Trustees for State Colleges and Universities,

(7) The Louisiana Board of Elementary and Secondary Education, a party who obtained in its favor a summary judgment,

(8) The Bossier Parish School Board, a party who obtained in its favor a summary judgment, and

(9) The St. Bernard Parish School Board, a party who obtained in its favor a summary judgment.

In addition, Grambling State University Alumni Association participated in the court below as *amicus curiae*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT OF THE CASE	5
A. Background of the Controversy	6
B. The Holding Below	8
(i) On Liability	8
(ii) On Remedy	10
C. Final Decree; Appeal	11
THE QUESTIONS ARE SUBSTANTIAL	11
Conflict Between *ASTA* And *Norris* Must Be Resolved	14
The Standard for Desegregation of Higher Education Must Be Defined	16
The Lower Court's Judgment Based Only On Racial Identification Demands Review	18
The Court-Created Remedy Lacks Judicial Restraint and Demands Review	21
Disaster by Decree: The Dismantling of Southern University Law Center	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) .. 18
Alabama State Teachers' Ass'n v. Alabama Public School & College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) 4, 13-15
Artis v. Board of Regents of the University System of Georgia, No. CV 479-251 (slip op.) (S.D. Ga. 1981) (unpublished) 15
Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.) .. 15, 16, 18
Bazemore v. Friday, 478 U.S. 385 (1986) 9, 16-18
Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970) 28
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 29
Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 12
Dartmouth College v. Woodward, 4 Wheat. 518 (1819) 29, 30
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 19, 21-23
Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) [*Geier II*] 18
Green v. School Board of New Kent County, 391 U.S. 430 (1968) 9, 13-17
Meyer v. Nebraska, 262 U.S. 390 (1923) 29
Milliken v. Bradley, 418 U.S. 717 (1974) [*Milliken I*] 13, 22
Milliken v. Bradley, 433 U.S. 267 (1977) [*Milliken II*] 21-24, 26
Minnesota State Senate v. Beens, 406 U.S. 187 (1972) 12, 23-25
Monroe v. Board of Commissioners, 391 U.S. 450 (1968) 14
Norris v. State Council of Higher Education, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd sub nom., Board of Visitors v. Norris*, 404 U.S. 907 (1971) 10, 14, 15

TABLE OF AUTHORITIES—Continued

Page

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 16, 19, 21
Pierce v. Society of Sisters, 268 U.S. 510 (1925) .. 29
Raney v. Bd. of Educ., 391 U.S. 443 (1968) 14
Soria v. Oxnard School District, 488 F.2d 579 (9th Cir. 1973) 19
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 16, 21
Sweatt v. Painter, 339 U.S. 629 (1950) 27, 29
United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987) 16
United States v. Diebold, Inc., 369 U.S. 654 (1962) 18
Upham v. Seamon, 456 U.S. 37 (1982) 24
Whitcomb v. Chavis, 403 U.S. 124 (1971) 24
White v. Weiser, 412 U.S. 783 (1973) 24

CONSTITUTION OF THE UNITED STATES:

Article III 22
Fifth Amendment 28
Fourteenth Amendment ..... *passim*

LOUISIANA CONSTITUTION OF 1974:

Article VIII 3, 4

STATUTES:

U.S. Statutes:

Civil Rights Act of 1964 (Pub. L. 88-325, 75 Stat. 241) ..... *passim*
Section 601 5
Section 602 5
Public Law No. 94-381, § 7 3

U.S. Code:

28 U.S.C. § 1253 3
28 U.S.C. § 1345 3
28 U.S.C. § 2281 3
28 U.S.C. § 2284 3

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 2000d	3
42 U.S.C. § 2000d-1	3
Louisiana Statutes:	
Act 252 of the 1989 Regular Session	13
Act 789 of the 1989 Regular Session	8, 13
La. R.S. 17:1453-1456	4
La. R.S. 17:1501-1503	4
La. R.S. 17:1511-1513	4
La. R.S. 17:1516-1517	4
La. R.S. 17:1521-1523	4
La. R.S. 17:1531-1533	4
La. R.S. 17:1551-1553	4
La. R.S. 17:1555	4
La. R.S. 17:1601	4
La. R.S. 17:1606-1607	4
La. R.S. 17:1611(5) and (19), 1612, 1641 and 1644	4
La. R.S. 17:1806	4
La. R.S. 17:1808	4
La. R.S. 17:1809, 1810, 1812 and 1813	4
La. R.S. 17:1831 and 1833	4
La. R.S. 17:1851 and 1853	4
La. R.S. 17:2050	4
La. R.S. 17:2054	4
La. R.S. 17:2151-2163	5
La. R.S. 17:2181-2193	5
La. R.S. 17:2196.1-2196.9	5
La. R.S. 17:2209-2210	5
La. R.S. 17:3011(A)(1)(a)	5
La. R.S. 17:3121-3133	4
La. R.S. 17:3201, 3305 and 3351-3387	4
La. R.S. 17:3453(B)	5
La. R.S. 36:651(D)(1), (2), (3) and (4)	5
MISCELLANEOUS:	
Baier, *Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control*, 47 La. L. Rev. 123 (1986)	29

TABLE OF AUTHORITIES—Continued

	Page
Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976)	28
Fed. Rule Civ. Pro., Rule 52(a)	26
Fed. Rule Civ. Pro., Rule 56(c)	18
Rufus Choate, *Eulogy on Daniel Webster*, in I. R. CHOATE, WORKS 516 (1862)	30

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ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
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v.

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On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF LOUISIANA

The State of Louisiana, appellant herein, prays that an order be entered noting probable jurisdiction of its appeal from the final decree of a three-judge panel of the United States District Court of the Eastern District of Louisiana, entered in this cause on July 19, 1989, declaring Louisiana and its institutions of higher education to be using Federal funds in violation of Title VI of the Civil Rights Act of 1964, enjoining enforcement of Article VIII of the Louisiana Constitution of 1974 and relevant parts of Title 17 of the Louisiana Revised Statutes as unconstitutional under the Fourteenth Amendment, and restructuring Louisiana's system of public higher education.

OPINIONS BELOW

(i) The July 19, 1989 opinion and order of the three-judge court is unreported (App. A, pp. 39a-77a).

(ii) The August 4, 1989 opinion and supplemental order of the three-judge court granting in part and denying in part motions of the United States of America, the Southern University Board of Supervisors joined by the State Attorney General, and Grambling University Alumni Association to alter or amend judgment or for new trial is unreported (App. A, pp. 105a-108a).

(iii) The August 4, 1989 opinion and order of the three-judge court denying the motion of Southern University Board of Supervisors joined by the State Attorney General for a stay of execution of judgment pending appeal to the United States Supreme Court is unreported (App. A, pp. 78a-80a).

(iv) The August 2, 1988 opinion and order of the three-judge court determining, *inter alia*, liability against Louisiana as a matter of law on the United States' summary judgment motion is reported at 692 F. Supp. 642 (App. A, pp. 3a-38a).

(v) The September 8, 1981 opinion and order of the court below approving entry of the Consent Decree is reported at 527 F. Supp. 509 (App. C, pp. 256a-266a).

(vi) The September 8, 1981 Consent Decree is unreported (App. C, pp. 199a-251a).

(vii) The Special Master's Final Report and Proposed Order of May 26, 1989 is unreported (App. C, pp. 623a-720a).

JURISDICTION

(i) This was an action brought by the United States of America against the State of Louisiana alleging that Louisiana was maintaining a dual system of public higher education on the basis of race in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act

of 1964. The system alleged to be racially discriminatory by the United States existed in explicit conformity with State constitutional and statutory provisions (*infra*, pp. 4-5) which were racially neutral on their face but which structured, allegedly, a dual system perpetuating racial identifiability as shown by statistics attached to the complaint. Jurisdiction in the district court was predicated on 28 U.S.C. § 1345 and 42 U.S.C. §§ 2000d and 2000d-1.

(ii) The final judgment and decree of the court below holding that Louisiana and its institutions of higher education were using Federal funds to further discrimination by maintaining a dual system of public higher education in violation of Title VI of the Civil Rights Act of 1964, enjoining the enforcement of Article VIII of the Louisiana Constitution of 1974 and the relevant sections of Title 17 of the Louisiana Revised Statutes as being unconstitutional, and restructuring Louisiana's system of public higher education was entered on July 19, 1989, in combination with its August 2, 1988, interlocutory order finding violations by Louisiana and its public higher educational authorities. Motions to alter or amend the judgment, for new trial, and to stay execution of the judgment pending appeal to the United States Supreme Court were denied on August 4, 1989. The State of Louisiana's notice of appeal (App. E, pp. 1157a-1160a) was filed in the court below on August 10, 1989.

(iii) This action was heard by a three-judge court requested by the United States subsequent to the filing of the original complaint on March 14, 1974. Jurisdiction properly lies in this Court under 28 U.S.C. §§ 1253, 2281, 2284 and Public Law No. 94-381, § 7, which preserves direct appeals for all three-judge actions brought under 28 U.S.C. § 2281 prior to August 12, 1976. The three-judge court which rendered the orders now before this Court concluded in its August 2, 1988 opinion that "Plaintiff having properly requested a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened." App. A, p. 10a.

(iv) The case relied on to sustain the jurisdiction of the three-judge court and hence to establish that the remedy here is by appeal is *Alabama State Teachers' Ass'n v. Alabama Public School & College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Provisions of the Louisiana Constitution invalidated and enjoined from enforcement by the court below as violative of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act include Article VIII, Sections 1, 5, 6, 7, 8, and 12 thereof. (App. B, pp. 116a-125a.) So unrestrained was the sweep of the lower court's judgment that it also enjoined the enforcement of almost half of the entire title of Louisiana's Revised Statutes on education, such that it is difficult to compile a comprehensive list.

Those most obviously invalidated and enjoined include Louisiana Revised Statutes, Title 17, Sections 3215 through 3221 (cited as La. R.S. 17:3215-3221) and La. R.S. 17:3121-3133 (App. B, pp. 126a-143a).

Also immediately and directly invalidated and enjoined were La. R.S. 17:3201-3202; La. R.S. 17:3205-3207; La. R.S. 17:3301-3306; La. R.S. 17:3351-3356; La. R.S. 17:3361-3367; La. R.S. 17:3371; and La. R.S. 17:3381-3383. (App. D, pp. 1048a-1067a.)

Other related statutes the enforcement of which is either enjoined directly or made into an impossibility by the lower court's judgment include La. R.S. 17:1453-1456; La. R.S. 17:1501-1503; La. R.S. 17:1511-1513; La. R.S. 17:1516-1517; La. R.S. 17:1521-1523; La. R.S. 17:1531-1533; La. R.S. 17:1551-1553; La. R.S. 17:1555; La. R.S. 17:1601; La. R.S. 17:1606-1607; La. R.S. 17:1611 (5) and (19), 1612, 1641, and 1644; La. R.S. 17:1806; La. R.S. 17:1808; La. R.S. 17:1809, 1810, 1812, and 1813; La. R.S. 17:1831 and 1833; La. R.S. 17:1851 and 1853; La. R.S. 17:2050; La. R.S. 17:2054; La. R.S.

17:2151-2163; La. R.S. 17:2181-2193; La. R.S. 17:2196.1-2196.9; La. R.S. 17:2209-2210; La. R.S. 17:3011(A)(1)(a); La. R.S. 17:3453(B); and La. R.S. 36:651(D)(1), (2), (3), and (4).

STATEMENT OF THE CASE

This is a higher education desegregation case. The United States sued the State of Louisiana on March 14, 1974, pursuant to sections 601 and 602 of the Civil Rights Act of 1964 and the Fourteenth Amendment, alleging Louisiana was maintaining a dual system of higher education based on race. Louisiana denied liability because of its open admissions policy at all public institutions of higher education since 1964. In September 1981 the parties voluntarily settled the suit by entering into a Consent Decree approved by the court below. After six years' enforcement of the Consent Decree, the United States moved for a hearing to determine (1) whether the defendants had fully implemented all provisions of the Consent Decree and (2) whether Louisiana's higher education system was unitary. However, no such compliance hearing was held. Instead, the court below instructed the parties to file cross-motions for summary judgment on the issue of liability. Thereafter, the court below found the state to be liable and in violation of the Civil Rights Act of 1964 and accordingly granted the United States' Motion for Summary Judgment. It appointed a special master for purposes of fashioning a remedial decree, and, following submission of desegregation plans by the parties and the final report of the special master, the court entered a final decree holding Louisiana liable and enjoining the enforcement of Louisiana's constitutional and statutory provisions regarding the management of public higher education. The court below converted Louisiana's junior colleges into community colleges; it judically legislated the establishment of a comprehensive system of community colleges for Louisiana; it re-tiered and altered the missions of Louisiana's public institutions of

higher learning; it restricted degrees awardable by institutions; it established new, stricter, and more selective admissions standards. The panel went further and abolished Louisiana's constitutional boards of higher education, judicially legislating a single "superboard" of goverance for public higher education in the State. And most drastically of all, the district court ordered merger of Southern University Law Center into Louisiana State University Law Center without a hearing, contrary to the recommendations of all parties and the court-appointed special master.

A. Background of the Controversy

In January 1969, the Department of Health, Education and Welfare (H.E.W.) notified Louisiana that the State's higher education system was not in compliance with Title VI of the Civil Rights Act of 1964. H.E.W. requested the State to submit a desegregation plan. Believing it was in compliance, the State submitted none. This suit followed on March 14, 1974.

In 1974, the people of Louisiana ratified a new state constitution restructuring the State's system of higher education and putting into place the current multiple-board governing system. Given a choice on the ballot, Louisiana's citizens specifically rejected the single board proposal and voted instead for the alternative provision creating four governing boards. The Board of Regents was created and charged with planning, coordinating, and budgeting the higher educational system as a whole. Three additional boards manage the 17 colleges and universities in the public sector.

Prior to trial on the merits, defendants, although denying liability, entered into a Consent Decree with plaintiff. The Consent Decree was approved by the court below on September 8, 1981. By the express terms of the decree, the measure of compliance was good faith. *See* App. C, p. 237a ("PART VII, Compliance Standard").

The Consent Decree was to expire automatically on December 31, 1987, unless a party filed a timely motion to determine whether defendants had fully implemented the Decree and were operating public higher education on a unitary basis. Since the effective date of the Civil Rights Act of 1964, Louisiana's public colleges and universities have had a policy of permitting any high school graduate of any race to freely choose to be admitted to and to attend any public college or university.

For six years following the Consent Decree in 1981, Louisiana engaged in an extensive program designed to fully integrate its system of higher education as outlined in the Decree. The Board of Regents distributed informational brochures describing all institutions of higher education, encouraging all citizens to attend other-race institutions, informing students of available financial assistance, and clearly reciting a non-discrimination policy. Each school in the system has a student-recruitment plan, designed to attract other-race students, administered by an employee specifically responsible for other-race recruitment. Active recruitment of other-race faculty was encouraged by establishment of a graduate fellowship program providing state funds for full-time graduate study by persons who would become faculty members at other-race schools. New academic programs were implemented at the predominately black institutions where facilities were improved and financial support increased as part of enhancement efforts. *See* Board of Regents' Motion for Summary Judgment, App. C, pp. 472a-497a. According to the court below, Louisiana expended "over $200 million towards the consent decree," App. A, p. 35a, aimed at enhancing black colleges and universities.

In complying with the Consent Decree, Louisiana went far beyond neutral admissions and nondiscriminatory policies and practices in its higher educational system. Apart from the Consent Degree, the most recent Legisla-

ture enacted the "Taylor Plan,"[1] Act 789 of the 1989 legislative session, La. R.S. 17:3026 (App. B, pp. 148a-152a), which provides a tuition and fee waiver to "all needy, qualified, college-bound state residents." This Act, removes all economic obstacles to the exercise of a truly free choice by high school students, regardless of race, in pursuit of higher education in Louisiana. The "Taylor Plan" signifies that Louisiana has gone farther than any other state in providing equal access to public institutions of higher learning.

B. The Holding Below

(i) *On liability.*

Two days before the Consent Decree was to expire, the United States moved for a compliance hearing. None was held.

The district court held Louisiana to be in violation of Title VI of the 1964 Civil Rights Act. It condemned "the entire structure of the consent decree," App. A, p. 35a, which the court below had itself approved, without measuring Louisiana's good faith compliance. While admitting that Louisiana had open admissions, the district court granted summary judgment based on statistics showing the continuing *de facto* racial predominance at Louisiana's colleges and universities.

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[1] Named for Patrick Taylor, a prominent Louisiana businessman who inspired an entire high school class of black disadvantaged students to stay in school, earn "B" averages, and obtain their high school diplomas by promising to pay their college expenses. See *"Taylor Is The Key,"* Times Picayune/States Item, Jan. 22, 1989, 3rd ed., Section B, p. 2. The promise of a free college education so motivated these "Taylor kids," as they are known, that their grades and ambitions soared. Their success prompted Patrick Taylor to propose a similar tuition and fee waiver program statewide. The Louisiana Legislature's adoption of the "Taylor Plan" in Act 789 evinces the State's commitment to increase the educational opportunities of all its citizens, particularly the financially disadvantaged, regardless of race.

The district court acknowledged that Louisiana had long since dismantled *de jure* segregation at the higher education level:

> "The present admissions policies to all of Louisiana's public institutions of higher education no longer discriminate on the basis of race or otherwise; any Louisiana citizen who has graduated high school may attend the Louisiana public college of his choice, regardless of the person's academic qualifications."

Id., p. 5a. But these neutral admissions policies were not enough, according to the district court, to satisfy what the court below determined to be the controlling legal standard, *viz.*, *Green v. School Board of New Kent County*, 391 U.S. 430 (1968):

> "The rationale in *Green* for finding that racially neutral admissions policies may at times be insufficient to satisfy the constitutional mandate to achieve unity [sic] systems of public education carries the same force in the higher education context as it does in the primary and secondary education context; all deliberate speed to achieve non-racially identifiable colleges is a must, just as it is for primary and secondary schools. When open admissions alone fail to disestablish a segregated school system, be it a primary/secondary school system or a college, then something more is required."

Id., p. 31a.

Rejecting the rationale of this Court's opinion in *Bazemore v. Friday*, 478 U.S. 385 (1986), the court below insisted upon "achieving integration," App. A, p. 34a, at the college level. The court below did this, notwithstanding the liberty of college students to attend the institution best suited to their educational needs. Under the district court's rationale, so long as Louisiana's colleges and universities remain racially identifiable, the

State fails in its duty of " 'convert[ing] its white colleges and black colleges to just colleges.' " *Id.* at 35a, quoting *Norris v. State Council of Higher Education*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971) (three-judge court).

As for Louisiana's four governing boards, they were also condemned as a matter of law.

(ii) The Holding Below on Remedy: *Restructuring Louisiana's System of Higher Education*

Drastic indeed was the judicially-imposed remedy. It radically restructured Louisiana's system of higher education—from top to bottom.

Louisiana's four governing boards, established in its 1974 Constitution by popular choice, were abolished, and a single "superboard" substituted in their place. Louisiana's traditional system of open admissions to colleges was condemned as a failure. In addition, a number of Louisiana's statutes were enjoined. A new system of "tiering" all colleges and universities was put into place, altering the educational mission of certain universities, restricting the degrees awardable, establishing new, stricter, and more selective admissions standards, and creating a new community college system throughout the State. App. A, pp. 63a-71a.

In one vital particular, the district court rejected the recommendation of its own special master *not* to merge Southern University Law Center and Louisiana State University Law Center. Special Master Paul R. Verkuil, a distinguished legal educator and former Dean of the Tulane University Law School, had expressly rejected the idea. App. C, pp. 647a-649a, 691a-693a. The United States also opposed merger of the law centers. App. C, pp. 785a, 787a-793a. Dean Charles Meyers of Stanford Law School and Dean Peter Hay of Illinois Law School had reached the same conclusion in a report that was

before the special master and the court below. App. D, pp. 1038a-1047a.

The judges ruled otherwise and ordered the merger.

C. Final Decree; Appeal

Motions to alter or amend the district court's final decree, for new trial, and for a stay of execution were denied by the court below on August 4, 1989 (App. A, pp. 78a-108a). Louisiana filed its timely Notice of Appeal to this Court on August 10, 1989 (App. E, p. 1157a). Enforcement of the district court's final decree against Louisiana was stayed by this Court on August 18, 1989, pending the timely docketing of appeals and final disposition thereof by this Court (App. A, p. 2a).

THE QUESTIONS ARE SUBSTANTIAL

It is Louisiana's position that the district court erred in finding Louisiana in violation of the Civil Rights Act of 1964. Its finding was based solely on statistics showing a high predominance of one-race students at colleges and universities which 25 years ago were segregated by state law.

But these statistics alone are insufficient to show a current violation of the Civil Rights Act of 1964, where such colleges and universities for 24 years have permitted any high school graduate of any race to be freely admitted to any college or university, where colleges and universities of the State have in good faith recruited other-race faculty members and students at historically one-race colleges and universities, and where the State has spent vast sums of money to upgrade academic programs and physical facilities at colleges and universities which have been historically attended by black students although open to all races for many years.

Louisiana is not discriminating in violation of the Civil Rights Act of 1964. On the contrary, all students are

exercising their constitutional right of free choice in selecting the college or university best suited to their educational needs.

Whether a state and its institutions of higher education are in violation of the Civil Rights Act of 1964 and the Fourteenth Amendment under these circumstances is a question that has never been decided by this Court. It cries for decision.

Louisiana and states similarly situated which are operating systems of higher education with completely open admission policies and without discrimination need to be freed from this turmoil.

In addition, the court below erred in judicially legislating a remedy which has swept aside the constitutional choices of the people of Louisiana regarding management of higher education, substituting a system drastically different from that freely chosen by Louisiana's people. Such radical surgery is plainly impermissible. *Cf. Minnesota State Senate v. Beens*, 406 U.S. 187, 198 (1972).

This Court should hear this case. It should require restraint. It should establish limits to judicial activism. It should require lower courts to respect the constraints of federalism. This Court should take federal district courts out of the business of establishing the governance, structure, and policies for the operation of higher education in states which have open admission policies and whose students have exercised their constitutional freedom to attend the institution of their choice.

The district court's higher education plan for Louisiana represents "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system," *Columbus Board of Education v. Penick*, 443 U.S. 449, 489 (1979) (Rehnquist, J., dissenting), all without the compelling justification found in *Penick* either factually or in the district court's "truism" fastening liability upon Louisiana as a matter of law.

In pursuit of the exclusive goal of racial balance in Louisiana's colleges and universities—as well as their governing boards—the court below has misinterpreted this Court's precedents.

The district court has erroneously equated the duty to desegregate higher education with that governing elementary and secondary schools, *viz.*, *Green v. School Board*, 391 U.S. 430 (1968). This is contrary to this Court's summary affirmance in *Alabama State Teachers' Ass'n v. Alabama Public School & College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) [hereinafter "*ASTA*"]. Such a result can be "supported only by a drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." *Milliken v. Bradley*, 418 U.S. 717, 747 (1974).

And in blindly condemning the Consent Decree below and finding the State in violation of Title VI—all in pursuit of racial balance—the district court has ignored the liberty of individuals to attend the college or university best suited to their educational needs.

Indeed, it is the State's position that Louisiana has more than met its duty under the Civil Rights Act of 1964 and the Fourteenth Amendment. For more than 24 years, any high school graduate of any race has been permitted to freely choose to be admitted to and to attend any college or university. For years, Louisiana's colleges and universities have actively recruited other-race students and faculty members at colleges and universities that 25 years ago were segregated. Today, Louisiana has adopted a tuition savings and tuition waiver plan to financially assist all citizens seeking higher education.[2] And Louisiana has spent more than $90 million dollars to upgrade facilities and programs at colleges and uni-

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[2] Acts 252 and 789 of the 1989 Regular Session of the Louisiana Legislature, App. B, pp. 144a-152a.

versities historically dedicated to the higher education of black students. That colleges and universities are racially identifiable 25 years after the adoption of the Civil Rights Act of 1964 is the result only of the exercise of the constitutional right of free choice by students attending these institutions.

And by liquidating Southern University Law Center—*sua sponte* and without so much as pausing to hear from the affected parties—the court below has denied equal educational opportunity to countless law students, both black and white, under the guise of enforcing the liberating equality of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment.

A result so destructive of local autonomy and educational opportunity imperatively calls for corrective review by this Court.

Conflict Between *ASTA* and *Norris* Must Be Resolved

First. The ruling below rests upon a false conclusion of law, *viz.*, that the continuing racial identifiability of Louisiana's colleges and universities—and their four governing boards—constitutes as a matter of law a present violation of Title VI and the Fourteenth Amendment notwithstanding the policy of nondiscriminatory open admissions at all colleges and universities for twenty-four years. But as Judge Frank Johnson noted in *ASTA* (289 F. Supp. at 787):

> "[N]o court in dealing with desegregation of institutions in the higher education area has gone farther than ordering nondiscriminatory admissions. That is also as far as Congress went in the 1964 Civil Rights Act."

The *ASTA* court, unlike the court below, distinguished *Green v. School Board*, 391 U.S. 430 (1968) and its companion cases, *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968); *Raney v. Bd. of Educ.*, 391 U.S. 443 (1968), saying (289 F. Supp. at 790):

> "[w]e do not interpret those decisions as applying to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, viz., fitting the right school to the right student."

And more (*ASTA*, 289 F. Supp. at 788, 789-90):

> "Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.
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> • • • •
>
> "We conclude, therefore, that as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied."

Accord, Artis v. Board of Regents of the University System of Georgia, No. CV 479-251 (slip op.) (S.D. Ga. 1981) (unpublished) (App. C, pp. 344a-354a); *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.).

This Court summarily affirmed in *ASTA*, 393 U.S. 400 (1969). We submit the court below erred in not following *ASTA*'s rationale.

True, this Court's summary affirmance in *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd sub nom., Board of Visitors v. Norris*, 404 U.S. 907 (1971), bespeaks a contrary rule, namely, that *Green v. School Board* applies with full force in the context of higher education.

Resolution of this conflict is itself a substantial federal question presented by this case, and the need for a definitive ruling from this Court is heightened by the pendency of other higher education desegregation cases in the lower courts. See, *e.g.*, *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987); *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.).

The Standard for Desegregation of Higher Education Must Be Defined

Second. In *Bazemore v. Friday*, 478 U.S. 385, 408 (1986), this Court held that the "mere continued existence of single-race [4-H] clubs does not make out a constitutional violation," where "one's choice of a Club is entirely voluntary," and the state has "discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy." This Court distinguished *Green*: "[H]owever sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu. We agree with the submission of the United States in this respect." *Id.*

What the United States argued in *Bazemore* (App. D, p. 813a) is that "De facto segregation that is purely the product of private decision making, and thus not attributable to any action by the state, is not proscribed by the Constitution." Brief for the Federal Petitioners, Nos. 85-93, 85-428, October Term 1985, pp. 44-45 (the pertinent part of the United States' Brief is set forth in full in App. D, p. 802a-819a). "[R]acial imbalance caused by these voluntary choices of private citizens" is beyond the reach of federal courts. "To conclude otherwise would be to equate racial balance with effective desegregation; an equation that, as noted, *Swann* and *Spangler* expressly rejected." *Id.* at 45, 46.

The United States distinguished the holding and analysis in *Green* and its companion cases "in situations where private choice, rather than official compulsion, is the

means by which attendance is determined." *Id.* at 46. This includes the field of higher education, according to the United States' submission in *Bazemore*:

> "No such constitutional infirmity attaches to the continuance of free choice in those situations where such choice is a traditional aspect of the government program or activity. In contexts such as public parks, *higher education* and the 4-H Clubs here, participation or attendance in the state activity is wholly voluntary in all respects."

Id. at 48 (emphasis added). The United States cited this Court's summary affirmance in *ASTA* in support of its submission that *Green* is "inapposite in the higher education context because admissions there are traditionally governed by private choice." *Id.* at 49.

In the court below, the United States took the position that "*Bazemore* applies." App. A, p. 30a. To this, the court below responded: "Plaintiff's position is curious, for if *Bazemore* applied, defendants would almost surely be entitled to summary judgment." *Id.*, n. 70.

We agree with the United States that *Green* is inapplicable in the context of higher education and that *Bazemore* applies here. Good faith and affirmative conduct on the part of the State to provide equal opportunity for a quality education are criteria which Louisiana has satisfied. As the court below recognized, application of the *Bazemore* standard "surely" results in a summary judgment for the State.

The freedom of Louisiana high school graduates to choose the public college or university they will attend is not, of course, the sole basis on which Louisiana's efforts should be judged. Louisiana not only gives an opportunity, by open admissions, for students to pursue any educational path they choose, but the State also actively encourages its high school graduates to choose other-race institutions. Through recruiting and incentive programs

Louisiana is integrating the administration, staff, and faculty of its public colleges and universities with the goal of making all institutions attractive to students of both races. Louisiana has increased funding for capital improvements on predominantly black campuses and is introducing new academic programs at these institutions to make them attractive to students of all races. *See* Board of Regents' Motion for Summary Judgment, App. C, pp. 472a-497a. Surely Louisiana's good faith efforts should not have been swept aside by the court below as a matter of law. At a minimum, Louisiana's compliance with the Consent Decree presented a genuine issue of material fact precluding summary judgment. Fed. Rule Civ. Pro. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-159 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The lower courts are divided on the question whether *Bazemore* applies in the field of higher education. *Compare Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.) (*Bazemore* applies), *with Geier v. Alexander* [*Geier II*], 801 F.2d 799 (6th Cir. 1986) (*Bazemore* inapplicable). The question is an important one. The matter warrants plenary review here.

The Lower Court's Judgment Based Only On Racial Identification Demands Review

Third. The court below says "that the twenty institutions under the four higher education boards are continuing to be operated under an unlawful, dual system of education in violation of Title VI," App. A, p. 16a. And more, "In failing to achieve a truly unitary system at the higher level of public education, the State continues to provide polarization and separation on a racial basis." App. A, p. 33a. But nowhere is there any reasoned explanation for these legal conclusions—beyond the single fact, repeatedly emphasized by the court below, that

Louisiana's colleges and universities remain racially identifiable following enforcement of the 1981 Consent Decree. But the fact of continuing *de facto* racial identifiability is not enough to fasten liability on Louisiana as a matter of law. *Cf. Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435 (1976): "There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to defendants."

In *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977), this Court cautioned that "the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." We think it plain that the district court's ruling below falls short on both grounds. Not only has the court below misinterpreted this Court's precedents to require racial balancing at the university level, but there is simply no factual proof that the post-1981 changes in the racial mix of Louisiana's colleges and universities, which were the exclusive focus of the court below in granting summary judgment, were in any manner caused by intentionally segregative actions chargeable to the State. On the contrary, they are the result of free choice by students.

Without question, Louisiana has removed all racial barriers to its institutions of higher education. After twenty-four years of open admissions regardless of race, we submit that a finding of duality may not be premised solely on enrollment statistics. *Dayton Board of Education v. Brinkman, supra*, at 413. Similarly, where a school board has carried out a Consent Decree in good faith and has made substantial progress toward integration, a court should consider the intentions of the state before concluding that its higher education system remains dual. *See, e.g., Soria v. Oxnard School District*, 488 F.2d 579, 587 (9th Cir. 1973), in which the court

held that a finding of duality may not be made on summary judgment.

Accordingly, if the intentions of the State of Louisiana are given any consideration, the United States was not entitled to summary disposition of this case. To the contrary, on the record presented and under a standard appropriate for institutions of higher education, the court below should have found that Louisiana has a unitary system of higher education.

The ruling below is equally deficient regarding the four boards of higher education in Louisiana. The court below says (App. A, p. 44a): "The governing boards of these universities are also racially identifiable." But again there is no finding whatever that this racial identifiability is in any way attributable to segregative action on the part of the State or its governor, who holds the power of appointment to the boards. "Retaining such vestiges of segregation," says the court below (App. A, p. 44a), "is not an appropriate solution to the problems before this Court," but surely the district court's understanding of "vestiges of segregation" is strained, given the fact that Louisiana's multiple board governance structure is like that of other lawful higher education structures in this country and was deliberately adopted by the people of Louisiana by constitutional choice in 1974.

Poise is likely to be lost in contemplating what the court below next says (App. A, p. 45a) (emphasis added) in sweeping aside Louisiana's four-board governance structure authorized in the Louisiana Constitution of 1974:

> "*A truism thus emerges*: The present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case. The system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution."

Just how the present governing structure "has perpetuated illegal segregation" is never explained.

The Court-Created Remedy Lacks Judicial Restraint and Demands Review

Fourth. Next, we reach what is doubtless the most troubling aspect of this case: the wholesale revision of Louisiana's higher education system by federal court decree. Surely the judicial takeover of the structure and content of Louisiana higher education should give this Court pause.

This Court has cautioned that "it must be recognized that there are limits," *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 28 (1971), "beyond which a court may not go in seeking to dismantle a dual system." *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976). And in *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977), this Court warned that "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." Again,

> "The power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It "may be exercised 'only on the basis of a constitutional violation.' " Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." "

Dayton Board of Education v. Brinkman, 433 U.S. 406, 419-20 (1977) (citations omitted).

On the record below, we think these limits were widely exceeded by the district court.

Preliminarily, we pause to note the obvious: the district court's higher education plan will "disrupt and alter the [constitutional] structure of public [higher] education in [Louisiana]. The [statewide] remedy would require, in effect, consolidation of [4] independent [boards] historically administered as separate units into a vast

new super[board]." *Milliken v. Bradley*, 418 U.S. 717, 752-43 (1974). What this Court feared in *Milliken I* has happened here:

> "absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a *de facto* 'legislative authority' to resolve these complex [operational] questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives."

Id. at 743-744.

Without question, the district court's higher education plan for Louisiana is the most disruptive exercise of federal equity jurisdiction as can be imagined in our federal system. Whatever the educational merits of the plan, it cannot stand as a lawful exercise of Article III judicial power.

Item. Since the district court's "truism" condemning Louisiana's multiple board arrangement fails for want of proof, the court below "imposed a remedy which we think was entirely out of proportion to the constitutional violations found by the District Court," *Dayton Board of Education v. Brinkman, supra* at 418. Nothing other than the district court's *ipse dixit* justifies a finding that Louisiana's four-board governance structure "has perpetuated illegal segregation in Louisiana higher education" and "is therefore a defect in the state's system of higher education that violates the federal constitution." Hence, the court below violated the well-settled principle that "federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the constitution or does not flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977).

Item. Assuming, arguendo, that the current racial identifiability of Louisiana's higher education system, including its governing boards, constitutes "lingering segregation" mandating summary judgment, as held by the court

below, see App. A, p. 90a, we submit that no compelling reason supports the district court's choice of a single-board governance structure over the multi-board system deliberately chosen by the people in the Louisiana Constitution of 1974. The link between the remedy imposed and the goal of desegregation is simply too weak, on the record made out below, to justify the drastic disruption of policy choices that are, we submit, "for the State to determine in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people." *Minnesota State Senate v. Beens*, 406 U.S. 187, 200 (1972).

We agree completely with the United States' submission before the special master that "the decision whether or not to create a single board should be for the state alone to make, not for the Court to order." See App. C, p. 653a. Otherwise local control of schools and colleges will be lost to federal judges, contrary to this Court's frequent admonition that "local autonomy of school districts is a vital national tradition." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977).

The panel decided that Louisiana's four board system "has perpetuated illegal segregation in Louisiana's higher education [system]." App. A, at p. 45a. This unexplained and unjustified finding ignores the efforts of the State since the 1981 Consent Decree. The panel also failed to explain why or how the single board it requires will eliminate the racial identifiability which the three judges so strongly condemned. As the special master specifically noted: "Segregation occurs in single board states and integration in multi-board or coordinated states." App. C, at p. 656a. The panel has not explained how its drastic restructuring of the Louisiana system is related to the violation found or will have the remedial effects required by *Milliken II*.

That a single board "would help"; that it is "a step in that direction"; that it "has facilitated desegregation in Florida"; and that its potential for success in Louisiana

is "not in any way implausible" [3]—these links are simply too attenuated to meet the standard of necessity required of federal court decrees that intrude upon vital state policy choices and local educational autonomy. See, *e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 275, 277 (1977) (approving only what "was necessary"; "only what is essential"). *Cf. Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971), "in which we held that the District Court erred in fashioning a court-ordered plan that rejected state policy choices more than was necessary to meet the specific constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (1982).

What this Court has said about tailoring reapportionment decrees to fit state policy choices applies as well to desegregation decrees:

> "[A] federal district court should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions whenever adherence to state policy does not detract from the requirements of the Federal Constitution . . . ."

White v. Weiser, 412 U.S. 783, 795 (1973). And in fashioning a desegregation plan "or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy *any more than necessary.*' " *Id.*, quoting *Whitcomb v. Chavis*, *supra*, at 160.

We submit it was not open to the court below to cast aside Louisiana's multi-board constitutional arrangement in favor of a remedy whose potential for success is registered only as "not in any way implausible" by the court-appointed special master.

In *Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), the district court cut the size of the State Senate in half in order to "best" apportion it and to achieve "positive benefits to the State"—all with the Governor of Minnesota's blessing. 406 U.S. at 191, 192. Said this Court by way of summary reversal on appeal:

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[3] *See* Report of Special Master, App. C, pp. 653a, 656a, 654a, 658a.

> "That is a matter of state policy. We certainly are not equipped—and it is not our function and task—to effectuate policy of that kind or to evaluate it once it has been determined by the State. Neither is it the function and task of the Federal District Court. Size is for the State to determine in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people."

Id. at 200.

We say the same thing regarding the structure and content of Louisiana's higher education.

As for Governor Charles E. "Buddy" Roemer's support for the single board, the short answer is what this Court said in *Beens*: "The present Governor's contrary recommendation, although certainly entitled to thoughtful consideration, represents only the executive's proffered current policy." 406 U.S. at 197. The Louisiana Legislature has quite a different current policy, one favoring the multiple board structure written into the Louisiana Constitution of 1974.[4]

Item. With regard to classifying and tiering Louisiana's institutions of higher learning, the special master noted: "The crucial issue regarding these remedies remains their relationship to the goal of integrating Louisiana higher education." Report of the Special Master, App. C, p. 667a. Here is what the master found:

> "The relationship between classifying or tiering public institutions and the desired goal of desegregation is *an inferential one.* There is no obvious and necessary connection between organization and desegregation. Thus how state universities are organized can be viewed as an educational matter not rising to constitutional levels. However, there is much to be said for structuring higher education to enhance quality and then ensuring that minority students participate at all levels of the system."

Id., p. 668a (emphasis added).

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[4] See Affidavit of Senator Foster L. Campbell, Jr., App. D, pp. 820a-821a.

A careful reading of the district court's opinion of July 19, 1989, shows that the court below, which is bound by the special master's findings of fact unless clearly erroneous, Fed. Rule Civ. Pro., Rule 52(a), bolstered what was only "an inferential" connection before the special master into "a strong correlation" before the reviewing court—all out of thin air. Here is what the district court said:

> "With regard to the structure of a proposed remdial system and the roles of the particular institutions within the system, there is no obvious and necessary connection between organization and desegregation. [Thus how state universities are organized can be viewed as an educational matter not rising to constitutional levels.] However, a *strong correlation* between classifying and tiering public institutions and desegregation may surely be inferred from structuring higher education to enhance quality while ensuring minority students participate at all levels."

App. A, p. 54a (bracketed sentence deleted from master's report by the court below) (emphasis supplied).

Surely this kind of judicial bootstrapping is impermissible, given "the principles of federalism abrogated by the decree." *Milliken v. Bradley*, 433 U.S. 267, 291 (1977).

We submit—respectfully but firmly—that the district court's higher education plan for Louisiana blatantly ignores the remedial guidelines set forth in *Milliken II*. It is disproportionate to the violation found, it is not remedial, and it ignores the State's paramount interest in managing public higher education in its own constitutional way. Moreover, the novel higher education context of this case suggests that the Court should take this opportunity to address the scope of remedial action, if any, which is appropriate when racial polarity persists for reasons unrelated to discrimination in public institutions of higher education.

Disaster by Decree: The Dismantling of Southern University Law Center

Fifth and finally. We submit that the district court below exceeded its equitable remedial authority and violated due process when it *sua sponte* ordered the merger of Southern University Law Center into the LSU Law Center without an evidentiary hearing and contrary to the recommendations of all parties and the court-appointed special master.

Surely the dismantling of Southern University Law Center without a hearing is a grave matter. Whether we are beyond the dark days of *Sweatt v. Painter*, 339 U.S. 629 (1950), whether today Southern University Law Center affords "equal educational opportunity" to countless students, both black and white,[5] who might not otherwise become lawyers—plainly these are agonizing questions worthy of this Court's consideration.

But we need not argue the merits of the court's order merging Southern's Law Center with LSU's—nor could we on this record.[6] A gross procedural error taints the

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[5] Southern University Law Center is the most integrated institution of higher education in Louisiana: 58% black and 42% white students. *See* App. A, p. 60a; App. C, p. 691a.

[6] We cannot, however, let pass without comment the surmise of the special master and the court below that "LSU Law Center's low percentage of blacks seems to be a factor of an admissions policy that makes no effort to attract black applicants . . . ." App. C, p. 692a; App. A, p. 61a. The affidavit of William D. Hawkland, Chancellor of the LSU Law Center, which was before the special master and the court below, shows (App. D, pp. 1024a-1025a):

(1) "Special recruitment strategies have been implemented in the effort to increase black enrollment."

(2) "In an effort to increase black student enrollment, the Law Center admits blacks who do not qualify for admission under the regular admissions criteria."

(3) "The Law Center has used its own resources to assist in the recruitment of minority students. In 1988, the LSU Board of Supervisors authorized the Law Center to award up to 10 [now 50] three-year tuition waivers per year to minority students. It is

decision below: the district court condemned Southern University Law Center as "the inferior school," App. A, p. 60a, producing "a secondary class of lawyers unable to compete fully in the professional context," *id.*, p. 61a, without an evidentiary hearing and without affording the affected parties an opportunity to be heard. This violates due process. U.S. Const., Fifth Amend.; *Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 292 (1970). Even the most enthusiastic supporters of institutional reform litigation stick to a modicum of due process. Thus, Professor Abraham Chayes, extolling "The Triumph of Equity" in public law litigation, cautions that: "The decree is also an order of the court, signed by the judge and issued under his responsibility . . . . But it cannot be supposed that the judge, at least in a case of any complexity, composes it out of his own head." Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1292, 1298 (1976).

Yet that is precisely what happened here. No party below recommended merging the law schools; the special master expressly rejected the idea: "[M]erger would involve vastly different institutional goals and faculty out-

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hoped that this financial support will assist in the competition for black candidates."

The court below ordered that "LSU Law School" [sic] shall undertake as soon as practicable, but no later than the 1990-1991 school year, vigorous efforts for recruiting blacks, including ten percent admissions exceptions for black students, offering scholarships to prospective blacks and appointing a special admissions officer for black students . . . ." App. A, p. 73a. Surely this is a bizarre order, for the record plainly shows that the LSU Law Center has had a special admissions officer for black students since 1982, as well as a vigorous recruitment program, including admissions exceptions and scholarships for black students. *See* Affidavit of Professor Eulis Simien, Jr., "Other-Race Recruiter for Paul M. Hebert Law Center," App. D, pp. 1027a-1029a.

In light of Chancellor Hawkland's and Professor Simien's sworn statements, the special master's and the district court's condemnation of the LSU Law Center's admissions policy regarding recruitment of black students remains a complete mystery.

looks, as well as levels of student achievement, and it should not be resorted to unless other approaches fail." Report of the Special Master, App. C, pp. 691a-692a.

The district court's merger order hit Southern University Law Center, its faculty, students, and alumni like a lightning bolt. Surely due process requires a hearing before a proud academic community is shattered by the force of law. *Cf. Dartmouth College v. Woodward*, 4 Wheat. 518 (1819). Liberty and property interests are jeopardized. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). "However worthy the goal of desegregation, it must not be achieved by means that fall short of minimum due process requirements." Baier, *Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control*, 47 La. L. Rev. 123, 138 (1986).

At the heart of due process is the opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Even in the *Sweatt* case, "a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School." 339 U.S. at 632.

We submit Southern University Law Center, its Chancellor, students, and faculty should not have been condemned to merger without a hearing and without an opportunity to contest the order and to explain their mission, their methods, and "those qualities which are incapable of objective measurement but which make for greatness in a law school." *Sweatt v. Painter*, 339 U.S. at 634. Surely their voices are entitled to be heard:

> "I decided to pursue my legal training at Southern University Law Center because I felt it would afford me an unparalleled opportunity to obtain a law degree in an environment which was sensitive to my concerns, while at the same time challenging and stimulating enough to insure me a quality education.

> "My decision to attend the Southern University Law Center was a conscious, affirmative and considered decision, made to the exclusion of all other possibilities.
>
> "I did not and do not wish to attend the Louisiana State University Law Center. I do not know if I would gain admission to the LSU Law Center under its current admission standards. However, I do desire to become a practicing attorney."

Affidavit of Rudy Gorrell, Student, Southern University Law Center, App. D, pp. 1155a-1156a.

The State of Louisiana firmly believes that Southern University Law Center is not "the law school for Negroes" of Heman Sweatt's day. It was error for the court below to order merger without an evidentiary hearing. The constitutional question presented is substantial.

We leave the last word to Webster:

> "Sir, you may destroy this little Institution; it is weak; it is in your hands! I know it is one of the lesser lights . . . . You may put it out.
>
> "It is, Sir, as I have said, a small college. And yet *there are those who love it.*" [7]

CONCLUSION

The decision below rests on grounds that cannot be supported, and the questions presented are substantial. This Court should therefore take jurisdiction of the present appeal.

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[7] These lines, of course, are from Daniel Webster's immortal peroration in the Dartmouth College case, *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819). They do not appear in Henry Wheaton's official report of the case. They were, however, preserved for students of the law in Rufus Choate's *Eulogy on Daniel Webster*, in I. R. CHOATE, WORKS 516 (1862) (emphasis in original).

Respectfully submitted,

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